

IRELL & MANELLA LLP
 David I. Gindler (117824) (dgindler@irell.com)
 Andrei Iancu (184973) (aiancu@irell.com)
 Michael G. Ermer (110496) mermer@irell.com
 Amir Naini (226627) anaini@irell.com
 1800 Avenue of the Stars, Suite 900
 Los Angeles, California 90067-4276
 Telephone: (310) 277-1010
 Facsimile: (310) 203-7199

Attorneys for Plaintiff and Counterclaim Defendant
 Ariosa Diagnostics, Inc.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

ARIA DIAGNOSTICS, INC.,
 Plaintiff,
 vs.
 SEQUENOM, INC.,
 Defendant.

Case No. 3:11-cv-06391-SI

**ARIOSA DIAGNOSTICS, INC.'S
 MOTION TO ENLARGE TIME TO FILE
 ITS OPPOSITION TO SEQUENOM'S
 MOTION FOR PRELIMINARY
 INJUNCTION**

[Filed concurrently with Declaration of
 Michael G. Ermer and [Proposed] Order
 Enlarging Time]

SEQUENOM, INC.,
 Counterclaim Plaintiff,
 vs.
 ARIA DIAGNOSTICS, INC.,
 Counterclaim Defendant.
 and
 ISIS INNOVATION LIMITED,
 Nominal Counterclaim
 Defendant.

Courtroom: 10
 Judge: Hon. Susan Illston

Pursuant to Local Rule 6-3, Plaintiff and Counterclaim Defendant Ariosa Diagnostics, Inc. (formerly known as Aria Diagnostics, Inc.) (hereinafter "Ariosa") respectfully submits this motion to enlarge the time in which to file its Opposition to Defendant and Counterclaim Plaintiff Sequenom, Inc.'s ("Sequenom") Motion For Preliminary Injunction ("Sequenom's Motion") until May 15, 2012. Good cause exists for this request. The parties stipulated and this Court ordered Sequenom to make all of its relevant witnesses available for deposition by May 4, 2012, with Ariosa then having one full week, until May 11, 2012, to file its Opposition to Sequenom's Motion. One of these relevant witnesses is Dr. Harry Hixon, the Chief Executive Officer ("CEO") of Sequenom. Dr. Hixson's deposition was originally scheduled (at Sequenom's request) for May 4, 2012, the final allowed day. Late in the day on May 1, 2012, counsel for Sequenom informed counsel for Ariosa that Dr. Hixson had to attend a funeral on May 4, 2012, and could not be deposed until May 8, 2012, four days after the Sequenom deposition deadline. Even an expedited transcript of Dr. Hixson's deposition will not be available until the end of the day on May 9, 2012. Counsel for Ariosa need the requested brief enlargement of time in order to review and analyze the final deposition transcript, and to incorporate the deposition testimony into Ariosa's Opposition to Sequenom's Motion.

Ariosa should not be prejudiced by Dr. Hixson's unavailability for a timely deposition in opposing Sequenom's Motion, which if granted would have dire consequences for Ariosa. As set forth in the accompanying declaration of Michael G. Ermer, Ariosa met and conferred with Sequenom in a good faith effort to reach an appropriate stipulation which would have rendered this motion unnecessary. The proposed extension of Ariosa's Opposition filing deadline to May 15, 2012 was rejected by Sequenom.

Sequenom opposes this motion.

FACTS

On March 8, 2012, Sequenom's Motion was filed, with an originally-noticed hearing date of April 13, 2012 (Docket No. 34). Shortly thereafter, the parties negotiated a schedule for expedited discovery and amended briefing, which was presented to this Court as a stipulation.

1 The Court entered the stipulated proposed order on March 21, 2012 (Docket No. 47). Exhibit 1 to
2 Ermer Decl.

3 Pursuant to this Court's stipulated order, Ariosa was entitled to depose all of the declarants
4 supporting Sequenom's Motion, and one other Sequenom witness (to be designated by Ariosa) by
5 May 4, 2012. Ariosa's Opposition to Sequenom's Motion is currently due on May 11, 2012, so
6 that Ariosa would have one full week after completion of the Sequenom witness depositions to
7 prepare and finalize its Opposition.¹

8 On April 12, 2012, counsel for Ariosa informed counsel for Sequenom that its one
9 additional Sequenom deponent would be Sequenom's CEO, Dr. Harry Hixson, and counsel for
10 Ariosa requested that counsel for Sequenom provide available deposition dates for Dr. Hixson.
11 Ermer Decl. ¶ 6; Exhibit 2 to Ermer Decl. As Sequenom's CEO and as someone who has been
12 affiliated with Sequenom for years, Dr. Hixson is an important witness for Ariosa to depose. After
13 diligent follow-up requests over the next two weeks by counsel for Ariosa for a deposition date for
14 Dr. Hixson (Ermer Decl. ¶¶ 7-10; Exhibit 3 to Ermer Decl.), counsel for Sequenom finally
15 informed counsel for Ariosa on April 26, 2012, that Dr. Hixson might be available for deposition
16 on Friday, May 4, 2012, the last available date under this Court's March 21, 2012 Stipulated
17 Order. Counsel for Ariosa sent a confirming e-mail on April 30, 2012 (Ermer Decl. ¶ 10;
18 Exhibit 4 to Ermer Decl.), and it served a deposition notice scheduling Dr. Hixson's deposition for
19 May 4, 2012 on May 1, 2012. Exhibit 5 to Ermer Decl.

20 At approximately 5:54 p.m. on May 1, 2012, counsel for Sequenom sent counsel for
21 Ariosa an e-mail stating that Dr. Hixson had to attend a funeral on May 4, 2012, and that the
22 earliest he could be deposed was Tuesday, May 8, 2012. Ermer Decl. ¶ 11; Exhibit 6 to Ermer
23 Decl.

24
25 ¹ After Ariosa's Opposition was to be filed on May 11, 2012, Ariosa's declarants and one
26 additional Ariosa witness (to be designated by Sequenom) are to be deposed by May 25, 2012.
27 Sequenom likewise will then have one full week after completion of the Ariosa witness
28 depositions to file its Reply in support of its motion (on June 1, 2012). The Court scheduled the
hearing date on Sequenom's Motion for June 15, 2012, so that the Court would have two full
weeks to review the parties' respective papers. Exhibit 1 to Ermer Decl.

1 Thus, because of Sequenom CEO Dr. Hixson's unavailability for a deposition on May 4,
 2 2012, Ariosa will be unable to depose him until Tuesday, May 8, 2012 – just three days before
 3 Ariosa's Friday, May 11, 2012 Opposition is due. Moreover, the earliest that even an expedited
 4 Dr. Hixson deposition transcript can be available is the end of the day on Wednesday, May 9,
 5 2012. This would allow only two days for counsel for Ariosa and one of its expert witnesses to
 6 review and analyze Dr. Hixson's deposition transcript for incorporation into Ariosa's Friday,
 7 May 11, 2012 Opposition papers. This is plainly not enough time and is prejudicial to Ariosa.
 8 Ermer Decl. ¶ 12.

9 Because of this unfortunate situation, counsel for Ariosa spoke in a meet and confer effort
 10 with counsel for Sequenom on May 2, 2012. In this telephone conversation, counsel for Ariosa
 11 proposed that, in light of the fact that Ariosa could not complete the deposition of CEO Dr. Hixson
 12 until Tuesday, May 8, 2012, Ariosa should still have its previously-agreed one full week to
 13 prepare and file its Opposition, which would mean it would be due on Tuesday, May 15, 2012.
 14 Ermer Decl. ¶ 13. Counsel for Ariosa stated that if Sequenom wanted an equal extension of its
 15 remaining deadlines, Ariosa would not oppose that, although the Court's approval would be
 16 necessary (given the Court's desire to have all of the briefing completed by two weeks before the
 17 hearing date). *Id.*

18 Counsel for Sequenom rejected this proposal in a following May 2, 2012 phone
 19 conversation, insisting that Ariosa still file its Opposition on May 11, 2012, despite Dr. Hixson's
 20 unavailability for deposition until just three days before then. Ermer Decl. ¶ 14. Counsel for
 21 Ariosa contacted the Court's Calendar Clerk and informed her and counsel for Sequenom that
 22 Ariosa would bring this Motion. *Id.*

23 In a final meet and confer attempt to resolve this issue without Court intervention, counsel
 24 for Ariosa proposed in another May 2, 2012, telephone conversation with counsel for Sequenom
 25 that Ariosa's Opposition be filed by the close of business on Monday, May 14, 2012, just one
 26 business day after the original Friday, May 11, 2012 deadline, and a day less than the one-week
 27 briefing period bargained for by the parties and ordered by this Court. Ermer Decl. ¶ 15. Counsel
 28

1 for Sequenom also rejected this proposal, offering only to extend the deadline for Ariosa's
2 Opposition to sometime before midnight on Sunday, May 13. *Id.*

3 Because this final proposal by Sequenom was unrealistic and unfair, Ariosa brings this
4 motion to enlarge time.

5 ARGUMENT

6 Sequenom seeks an injunction preventing Ariosa from selling its groundbreaking Harmony
7 non-invasive prenatal test. If the preliminary injunction is granted, the consequences for Ariosa
8 would be dire. With these enormous stakes in mind, counsel for the parties negotiated the
9 expedited briefing schedule which was submitted as a stipulation and ordered by the Court on
10 March 21, 2012.

11 Under these circumstances, it is unfair and unreasonable for Sequenom to insist that it be
12 allowed to violate the parties' agreement as reflected in the March 21, 2012 Stipulated Order by
13 not making CEO Dr. Hixson available for deposition until May 8, 2012, while Ariosa is still
14 compelled to comply with the current May 11, 2012 filing deadline for its Opposition. This
15 situation is all of Sequenom's making, despite Ariosa's diligent efforts to have all parties comply
16 with the March 21, 2012 Stipulated Order.

17 It would be entirely prejudicial for Ariosa to be penalized and Sequenom rewarded on
18 account of CEO Dr. Hixson's unwillingness to be deposed before Tuesday, May 8, 2012. Ariosa
19 is entitled under basic principles of due process to have adequate time to review, analyze and
20 integrate the deposition testimony of Sequenom's CEO in its Opposition papers.

21 At a very minimum, Ariosa is entitled to the benefit of the scheduling time periods for its
22 Opposition which it negotiated in good faith with Sequenom and which were ordered by this
23 Court. This would mean extending the deadline for Ariosa's Opposition to May 15, 2012, one
24 week after the rescheduled May 8, 2012 deposition of CEO Dr. Hixson.

1 For the reasons stated in the instant motion as well as the supporting Ermer declaration,
2 Ariosa respectfully requests that the Court enlarge the time in which Ariosa has to file its
3 Opposition to Sequenom's Motion until May 15, 2012.

4 Dated: May 3, 2012

Respectfully submitted,

5 IRELL & MANELLA LLP
6 David I. Gindler
7 Andrei Iancu
8 Michael G. Ermer
9 Amir Naini

10 By: /s/ Michael G. Ermer

11 Michael G. Ermer
12 Attorneys for Plaintiff and Counterclaim
13 Defendant
14 Ariosa Diagnostics, Inc.